

Understanding the Legal Rights of Government and Citizens Regarding Intervention on Behalf of Children: *Limits, Challenges and Opportunities*



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Individual and State Rights

- Individual Rights: Parenting
- Individual Rights: Consent to Treatment
- State Rights: Parens Patriae

Reconciling Rights: Balancing Tests

- Compelling State Interest
- Best Interest of the Child
- Protecting the Public Health

Application in Child Welfare

- Broader Definitions of Abuse and Neglect
- Expanded Newborn/Prenatal Assessment
- Questions Going Forward



Individual and State Rights

Where does the right to individual liberty come from?

Fourteenth Amendment to the Constitution of the United States:

*[N]or shall any State deprive any person of life, **liberty**, or property, without due process of law.*

What rights are protected by a guarantee of individual liberty?

- Right to marry and marital privacy
- Right to start a family and have children
- ***Right to direct the education and upbringing of one's children***

Deshaney v. Winnebago, 489 U.S. 189 (1979)

Renquist for the majority: *It is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father. The most that can be said of the state ... is that they stood by and did nothing when suspicious circumstances dictated a more active role for them ... It must also be said that, had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship.*

Blackmun Dissent: *Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents, who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except ... "recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles ...*

Consent

Every human being of adult years and sound mind has a right to determine what shall be done with his own body ... informed consent generally encompasses the right of a competent individual to refuse medical treatment. *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 277 (1990)

Parental Consent

The state commonly protects youth from adverse governmental action & from their own immaturity by requiring parental consent to or involvement in important decisions by minors. *Bellotti*, 443 U.S. at 637, *In re Martin*, 820 N.Y.S.2d 759 (Fam. Ct. 2006)

Limited Examples Where Consent Not Required

1. Imminent harm or threat of harm
2. Medical emergencies
3. Compulsory schooling for certain ages



What is parens patriae?

Legal doctrine that allows a state to take action to protect the rights of its citizens or in the interest of matters of public concern

The state has a parens patriae interest in preserving and promoting the welfare of the child.

Santosky v. Kramer, 455 U.S. 745 (1982)

Where does parens patriae come from?

- Historical roots and common law
- Constitutional limitations on fundamental rights

Reconciling Rights: Balancing Tests



Compelling State Interest

The state may override the fundamental liberty interest in the parent-child relationship only **when there is a sufficiently compelling state interest** ... the state's action must be narrowly tailored so as to produce the least intrusive interference with individual rights.

In re Martin F., 820 N.Y.S.2d 759, 770 (Fam. Ct. 2006)

Example: Compulsory Education

Best Interest of the Child

- The “best interest of the child” refers to the circumstances that will ensure the ultimate safety and well-being of the child.
- Courts consider a number of factors related to:
 - The child’s circumstances
 - The parent or caregiver’s circumstances
 - Capacity to parent, with the child’s ultimate safety and well-being the paramount concern

Example: Parental Consent





Protecting the Public Health

Determine if what legislature enacted “has no real or substantial relation to” protecting the public health.

Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905)

Example: Compulsory Vaccination

Reconciliation: Key Take-Aways

- 1) Test is applied where interests clash.
- 1) Evidence is critical to make a case.



Application to Child Welfare

CAPTA: Definition of Child Abuse and Neglect

“At a minimum any recent act or set of acts or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act, which present an imminent risk of serious harm.”

- **Threat to Harm:** Approximately **38 States** include acts or circumstances that threaten the child with harm or create substantial risk of harm in their definition of abuse.
- **Failure to Education:** Approximately **25 States** explicitly include failure to educate the child as required by law in definition of neglect.
- **Medical Neglect:** Approximately **13 States** specifically define medical neglect.

Summary of State Programs that Allow Newborn/Prenatal Child Welfare Cases

State	Time of Intervention	Data Used to Identify Children	When is Match Made	CW Response
Vermont	Prenatal: One month before due date	<ul style="list-style-type: none"> Report of substance use during last trimester by CPS worker/Doctor Medical findings 	When report is made	CPS will open an assessment
Maryland <i>Birth Match</i>	Newborn: Within one week	<ul style="list-style-type: none"> Birth records Involuntary TPR in the last 5 years Been identified as “perpetrator” 	Weekly basis	CPS opens an assessment; Conducts wellness visit or opens investigation
Michigan <i>Birth Match</i>	Newborn: ASAP (Could be as soon as 1 day)	<ul style="list-style-type: none"> Birth Records Parents with involuntary TPR Parent identified as “perpetrator” Serious maltreatment (Death, life threatening injuries) 	Daily basis	CPS intake worker opens an immediate investigation
New York City	Newborn	<ul style="list-style-type: none"> CPS Workers report pregnant mothers who have a other children currently in out-of-home placement . 	When report is made	Newborn will be removed, unless a compelling reason exists to let the child stay

Universalism v. Segmentation?

Pre-Emptive Intervention v. Reactive?

Mandatory v. Voluntary?





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